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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 06 117 53879 Office: NEBRASKA SERVICE CENTER Date: JUL 23 2007

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maura Deadrick
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner was employed as a postdoctoral fellow as of the date of filing. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement. For the reasons discussed below, while the petitioner is a prolific author whose scientific articles are beginning to gain limited recognition, we uphold the director's conclusion that the petitioner has not demonstrated her influence in the field such that a waiver of the alien employment certification is warranted in the national interest.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Medicine from Xi'an Jiaotong University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, immunology and cancer research, and that the proposed benefits of her work, improved tumor vaccines, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-

trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

As stated above, the petitioner received her Ph.D. from Xi'an Jiaotong University in 2001 under the direction of Professor [redacted]. She then accepted a postdoctoral fellowship with the Medical College of Wisconsin where she remained as of the date of filing. At the Medical College of Wisconsin, she collaborated with [redacted] and [redacted]. The director questioned the significance of the petitioner's postdoctoral work as she is not a program director or principal investigator. We note that both [redacted] and [redacted] have attested to the petitioner's role in research at the Medical College of Wisconsin. Their assertions are consistent with the petitioner's listing as first author on her most recent articles and the fact that she is the only postdoctoral or student researcher listed on the grant. The only other members of the team are Dr. [redacted] and technicians. Thus, we are persuaded that the petitioner can share the credit for the results of this team.

The petitioner has submitted evidence of her active membership in the American Association for Cancer Research (AACR), her membership in the American Association for the Advancement of Science (AAAS) and her trainee membership in the American Association of Immunologists (AAI). While some of the petitioner's references ascribe significance to these memberships, the letters from the associations themselves do not suggest that the categories of membership the petitioner has attained are particularly exclusive. We acknowledge that AACR requires two years of research resulting in peer-reviewed publications related to cancer and nomination by two members; however, we are not persuaded that the average cancer researcher would be unable to meet these requirements. Regardless, professional memberships fall under one of the regulatory criteria for aliens of exceptional ability, a classification that normally requires an alien employment certification certified by the Department of Labor. We cannot conclude that meeting one criterion, or even the requisite three criteria, warrants a waiver of that requirement in the national interest. *See Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 222.

The petitioner relies primarily on her publications and reference letters. The letters are from her colleagues and professionals who have not directly worked with her, although some of the more independent professionals are former coauthors or colleagues of [redacted] or [redacted]. We note that the letter purportedly from [redacted] of the University of Nevada is unsigned and, thus, has no evidentiary value.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of industry interest and positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through her reputation and who have applied her work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

Professor [redacted] asserts that while working towards her Ph.D., the petitioner "identified that IgV fragment of B7.2, which is [a] costimulatory molecule for T cell activation, can elicit the similar T cell activation function to the whole B7.2 molecule." Professor [redacted] asserts generally that this work provided insight into the role of costimulatory molecules in provoking an immune response but does not provide examples of this work being applied in the field. In addition, Professor [redacted] asserts that the petitioner authored a book on tumor genes that is an important guide for students and scientists. The record, however, contains no evidence regarding how well this book sold or that it is assigned reading in courses at major Chinese universities.

The record does contain evidence that the petitioner was a prolific author while in China and that she received academic and provincial awards. The petitioner, however, has not demonstrated that her Chinese articles have been widely cited, she submitted a single independent citation of her article on B7.2, and the record contains no letters from independent researchers in China who have been influenced by her. We note that formal government recognition is one of the regulatory criteria for aliens of exceptional ability, a classification that normally requires an alien employment certification certified by the Department of Labor. As stated above, we cannot conclude that meeting one criterion, or even the requisite three criteria, for that classification warrants a waiver of the alien employment certification in the national interest. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 222.

[redacted] asserts that the petitioner has the necessary skills to contribute to his laboratory. Simple training in advanced technology or unusual knowledge, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.* at 221. He further

asserts that her work has focused on creating novel cell-based cancer vaccines by genetically modifying cancer cells so that they express particular molecules important for generating immune responses. [redacted] concludes that the petitioner's work validates the potential of this approach. Specifically, [redacted] states:

> During these studies, [the petitioner] found that the cancer vaccines induced a unique population of $CD8^+$T lymphocytes that co-expressed the cell surface marker DX5 (also known as CD49b or VLA-2). This $CD8^+DX5^+$ cell population appears to play a crucial role in the anti-tumor effects against neuroblastoma both *in vitro* and *in vivo*. These interesting findings are leading to the development of a new project that will further investigate the role of DX5 in cancer immunity.

[redacted], an associate professor at the John Hopkins School of Medicine who was also at that institution during [redacted] time as a postdoctoral fellow there, asserts that this work generated a "potential" vaccine against neuroblastoma, a childhood cancer. He explains that the petitioner was able to clone and efficiently transduce costimulatory molecules such as B7 and 4-1BBL into neuroblastoma cells, crucial for activating an adaptive immune system. [redacted] continues:

> [The petitioner] is the first investigator to link 4-1BBL expression to a unique T cell subpopulation, which express both CD8 and DX5 (VLA-2) markers. Having been identified by [the petitioner], this population was found to be responsible for the significant protective effect of this new vaccine. This breakthrough by [the petitioner] demonstrates clearly her cutting-edge research abilities and that she is a major contributor to the field of cancer immunology.

Similarly, [redacted], an associate professor at Baylor College of Medicine whose postdoctoral training at Johns Hopkins overlapped with that of [redacted] also asserts that the petitioner generated new vaccines that have prevented tumor growth in animals. [redacted] Chief of the Laboratory of Cancer Immunobiology at the Oregon Health and Science University, asserts that he learned of the petitioner's work through her presentation at a conference. He asserts that the petitioner's vaccine is superior to other reported vaccines because "her vaccine was engineered to express two immune co-stimulatory molecules on the cancer cells that had not been previously tested by other researchers in this model."

The petitioner's 2003 article in *Cellular Immunology* and her 2004 article in *Immunology* both involved *in vivo* studies of potential vaccines. The record contains no evidence, however, that the petitioner is listed as an inventor on a patent application for a vaccine. Moreover, it can be expected that the development of a workable cancer vaccine would generate considerable media coverage. The record contains no media coverage and minimal citation of the petitioner's work. As of the date of filing, two independent research teams had cited the petitioner's 2003 article on the dual expression of CD80 and CD86. The article by researchers at the Université Paul Sabatier in

Toulouse merely cites the petitioner's work as one of three articles for the proposition that the induction of costimulatory molecule expression on tumor cells promotes antitumor immunity and the antigenicity of the melanoma cells varies with the level of their expression. The other independent citation is in Chinese.

[redacted], a professor at the Wisar Institute, has no clear connection to the petitioner but fails to explain how he learned of the petitioner's work. [redacted] asserts that the petitioner's research with $CD8^{+}DX5^{+}$ cell populations "paved the way for groundbreaking research in cancer and immunology scientific area [sic]." [redacted] does not identify the research or the research team for which the petitioner has "paved the way." [redacted] an assistant professor at the University of Texas and a coauthor of [redacted] states only that the petitioner's studies "hold great promise" and "pave the way" for future groundbreaking research.

While the petitioner acknowledges that she has yet to be widely and frequently cited, she asserts that her influence in the field is apparent from e-mail correspondence and letters from researchers who have relied on her work. The record contains e-mail correspondence between the petitioner and [redacted], a student at Harvard, regarding his attempt to use her cell line. The most recent message from [redacted] indicates that he had been unable to successfully utilize the petitioner's cell line. The record also contains e-mail correspondence between [redacted] and [redacted], a professor at Harvard, and then Ph.D. student [redacted][1] in Denmark requesting K562 cells. The petitioner also submitted letters from both [redacted] and now [redacted]

[redacted], who received his M.D. and Ph.D. from Johns Hopkins the year after [redacted] received his Ph.D. at the same institution, asserts that he learned of the petitioner's work through her article, coauthored with [redacted], in *Immunology*. [redacted] asserts that the petitioner's results "hold great promise" and affirms that he has "utilized the basic work product of [the petitioner's] work in my own area of research." [redacted] does not, however, explain how his work has been aided by the petitioner's work and the record contains no evidence that he has cited any of her articles.

[redacted] asserts that the petitioner created a useful scientific tool for expanding immune cells, which was reported in *Immunology* [redacted] continues:

> She kindly provided both the actual cells for use in my laboratory as well as additional detailed information on how to use the cells. The stimulator cell lines were used in my personal research focussed [sic] on how the immune system might be directed against tumor cells. In this line of research, the cells provided by [the petitioner] proved to be a very potent tool, by which I could circumvent many of the obstacles related to use of more traditional ways to address this issue.

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[1] [redacted] identifies himself as a Ph.D. student in his June 18, 2004 e-mail but as a Ph.D. recipient in his April 2006 letter.

It is clear that the petitioner's article in *Immunology* has generated some interest in the petitioner's work and that she has communicated her methods with at least two other research groups. It would appear, however, that, at best, the petitioner filed the petition prematurely, before her work was confirmed and applied by others as reported in peer-reviewed publications.

[redacted] further explains that the petitioner demonstrated that neuroblastoma produces high levels of the cytokine macrophage migration inhibitory factor (MIF). While MIF had been previously considered pro-inflammatory, the petitioner demonstrated that high levels of MIF produced by neuroblastoma cells actually suppressed T cell proliferation. [redacted] further asserts that they are now testing the biological significance of the petitioner's MIF findings in an animal model. [redacted] speculates that "if" these *in vivo* experiments demonstrate that blocking MIF enhances anti-neuroblastoma immune responses "this strategy could be used as a way to enhance immunity to neuroblastoma and perhaps other cancers that similarly produce high levels of MIF." He concludes that the petitioner's work in this area has "contributed significantly to our understanding of the potential mechanisms by which MIF may promote tumor growth." Several references, both colleagues and more independent researchers, assert that this work will have significance in the field. The petitioner had presented her MIF results at a conference in 2004 and her manuscript reporting her results was published just prior to the filing of the petition. The *in vivo* experiments had yet to be concluded. Thus, it appears premature to conclude that this work had already impacted the field as of the date of filing.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any postdoctoral research, in order to be accepted for publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.